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IN THE

Supreme Court of the United States

October Term, 1964.

No. 292.

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF OF PETITIONER THE ATLANTIC REFINING COMPANY.

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ARGUMENT.

Atlantic is filing this reply brief to point out that the argument of the Solicitor General in his Brief for the Federal Trade Commission—while arguably appropriate in the proceedings before the Commission and the Court of Appeals—is beside the point at issue in this Court. The reason is that the Solicitor General overlooks the important change in the case between the review by the Court of Appeals and the filing of the petition for certiorari here. That change was Atlantic's decision not to contest the issue of coercion; in other words, to accept the

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paragraphs of the Commission's order designed to eliminate coercion.¹

The Solicitor General says that the "crux of illegality" of the Atlantic-Goodyear agreement is that it "induces, even requires" Atlantic to "compel" its dealers to purchase sponsored TBA (FTC Br. 70, see also 34). He concludes that the net effect is "as though Atlantic had agreed with Goodyear and Firestone that it would require its dealers to purchase TBA" (FTC Br. 60), and he asserts that the effect of such an agreement would be the same as the effect of a tying agreement, namely, to deprive Atlantic dealers of their freedom of choice and foreclose competition in a substantial segment of the TBA market (FTC Br. 58, 59).

This argument misses the question presented to this Court:

1. The Government's argument overlooks paragraphs 5 and 6 of the Commission's order which are not under review and are therefore binding upon Atlantic. The

1. While Atlantic has no desire to reopen the coercion issue, its acceptance of the applicable paragraphs of the Commission's order does not mean that it accepts all the statements and implications in the Commission's Brief regarding coercion and control. For instance:

Contrary to the statements on page 17 of the Commission's Brief, Goodyear signs were not forced upon Atlantic dealers. Commission Exhibit 289 (R. 3030), written by the same official of Lee Tire & Rubber Company who wrote the exhibit cited in the Commission's Brief (CX 277, R. 2998), says that after investigation "I found, also, that their [Atlantic's] leased stations are not identified by Firestone unless there is an identification order signed by the dealer. In the case of Goodyear, when they sign up for a Goodyear Franchise, Good-year is automatically permitted to identify that location."

Contrary to the implications of the Commission's Brief, "The handling of recommended TBA is not a requisite for obtaining a loan, and no records are kept as to whether distributors or dealers who obtain loans do or do not sell recommended TBA" (R. 277).

Contrary to the statement on page 24 of the Commission's Brief, Atlantic's advertising and promotional assistance is made available to dealers regardless of the brands of TBA handled by the dealers, and Atlantic reimburses dealers for a part of their advertising costs "without regard to the brand of TBA which may be included" (R. 280-1).

order (R. 132-3) prohibits Atlantic from directly or indirectly:

5. Intimidating or coercing or attempting to intimidate or coerce any wholesaler or retailer of Atlantic petroleum products to purchase any brand or brands of TBA products;
6. Preventing or attempting to prevent any wholesaler or retailer of Atlantic petroleum products from purchasing and reselling, merchandising, or displaying TBA products of his own independent choice.

Under the foregoing interdictions Atlantic cannot "require" or "compel" its dealers to purchase sponsored TBA. In short, under the order Atlantic cannot tie TBA to its petroleum products or to its stations.

If, as the Court of Appeals found, Atlantic dealers were formerly held in "servitude caused by the coercive pressures which Atlantic exerts upon its dealers" (R. 3292), those coercive pressures will be eliminated by the Commission's order.

If, as the Solicitor General argues, Atlantic dealers used to "believe that they were required to purchase substantial amounts of sponsored TBA" (FTC Br. 48-9, see also 52), they will no longer be justified in that belief.

The Solicitor General fails to recognize that the broad issue of coercion (whether "overt" or "covert," "sophisticated" or otherwise)—which took up the bulk of the Examiner's Initial Decision as well as the opinions of the Commission and the Court of Appeals—is no longer in the case. It is paradoxical for the Solicitor General to argue that the sales commission agreement is unlawful because it requires Atlantic to tie sponsored TBA to its petroleum products—when the Commission has already issued an order to prohibit this same tying.

2. Implicit in the Government's argument is the premise that Atlantic's efforts in selling TBA to its dealers, and indeed its very relationship with its dealers, were

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"induced" by, or "undertaken" in response to, or "caused" by the Atlantic-Goodyear agreement.² (See, e.g., FTC Br. 36, 54, 58-9.) In fact, Atlantic's dealer relationships and its program of selling TBA to its dealers developed many years before Atlantic had its first dealings with Goodyear. There is no claim that the dealer relationship or the TBA selling efforts were changed in any way by reason of the sales commission plan.

The Commission recognized that Atlantic's dealer relationship, which the Commission equated with "economic power" over the dealers, "is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic" (R. 124). The same is true of Atlantic's TBA sales efforts.

The fact that Atlantic enjoyed established relationships with its dealer customers and had an expert sales force selling TBA to these customers was an inducement to Goodyear to enter into the sales commission arrangement. Neither the dealer relationship nor the TBA selling program can be considered an effect of the sales commission plan.

3. The Brief for the Federal Trade Commission does not face up to the crucial question posed by Atlantic's Brief. That question is this—once the dealers' freedom of choice has been assured by paragraphs 5 and 6 of the Commission's order, what remains to be accomplished by enforcing paragraphs 1 through 4 of the order and abolishing the sales commission plan?³

2. The Commission's Brief says that "everything" Atlantic did in respect of TBA was done "to satisfy its contractual obligation to sponsor and promote Goodyear products" (FTC Br. 70).

3. At the very least, the Commission should not abolish the plan until it has had an opportunity to reappraise it in the light of Atlantic's compliance with paragraphs 5 and 6 and, more importantly, in the light of up-to-date marketing information. Such information will be forthcoming from the Commission's industry-wide inquiry into the competitive problems of marketing gasoline discussed in

The futility of enforcing paragraphs 1 through 4 after paragraphs 5 and 6 have gone into effect can be simply demonstrated.

The Solicitor General recognizes (FTC Br. 65, fn. 32) that paragraphs 1 through 4 do not prevent Atlantic from "entering into contracts, or using various devices, to promote the sale of TBA products" so long as Atlantic itself is acting as the "TBA distributor or marketer." In short, the order does not prohibit Atlantic from selling TBA to its dealers; it merely requires that Atlantic act as the "distributor or marketer" (R. 132-3), i.e., that Atlantic assume responsibility for the distribution function.

The logic of the situation points inevitably to the conclusion that, if the sales commission plan is abolished, Atlantic will avail itself of the exception in the order and will resume the distribution of TBA to its dealers under the purchase-resale plan. The Solicitor General's suggestion (FTC Br. 67) that Atlantic might abandon its TBA program and hope that its dealers' needs would be filled by so-called "independent wholesalers," flies in the face of economics.⁴ All Atlantic's competitors provide TBA programs. The dealers expect it. Atlantic could not attract dealers or market its products if it did not offer an attractive and fully competitive TBA program.

It is reasonable, then, to assume that, if sales commission distribution is forbidden, Atlantic will establish with Goodyear a purchase-resale program covering the same products and the same territory as are now covered by their sales commission arrangement, that under this

Atlantic's Brief, p. 38, and in Goodyear's Brief, pp. 51-2. That inquiry should cover TBA because, as the Solicitor General recognizes, TBA is a "necessary appendage" of the petroleum business (FTC Br. 65-6).

4. Of course, under paragraphs 5 and 6 of the Commission's order, Atlantic dealers will have full freedom to deal with any wholesalers they please. But this is a far cry from leaving them without the assistance which only Atlantic provides.

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purchase-resale program supply points will be franchised by Atlantic rather than by Goodyear, and that there will be no change in Atlantic's efforts to sell and promote sponsored TBA to its dealers except such as required to guarantee their freedom of choice.⁵

The abolition of the sales commission plan will change only the responsibility for TBA distribution and delivery and the identity of some (but not all) of the supply points for deliveries to Atlantic dealers. How do these changes affect the competitive effects outlined on page 53 of the Brief for the Commission, these being the effects relied upon to justify abolition of the sales commission plan?

(a) If, as the Commission's Brief states, it is true today that small manufacturers are unable to sell to Atlantic because Atlantic "insists on dealing with a single supplier who has an extensive distribution system and handles a complete TBA line", that will not be affected by a change in the method of distributing TBA from sales commission to purchase-resale. Under either method Atlantic has the right to choose its TBA suppliers. The Commission's order abolishing the sales commission plan does not and could not require Atlantic, when it returns to purchase-resale, to deal with manufacturers who handle incomplete lines of products and provide inadequate distribution.

(b) If, as the Commission's Brief states, it is a fact that wholesalers of nonsponsored TBA "have been precluded from selling their products to Atlantic dealers," that will be cured by paragraphs 5 and 6 of

5. The Commission's Brief implies that Goodyear's willingness to pay a commission on sales gives Atlantic extra inducement to force its dealers to buy Goodyear TBA. The Brief overlooks the fact that under the sales commission plan a lost sale means simply a lost commission to Atlantic, whereas under purchase-resale Atlantic stands to lose the entire price of any TBA it buys and cannot resell. The sales commission plan, by relieving Atlantic of the necessity for selling, lessens the temptation to Atlantic to force the goods upon the dealers.

the Commission's order. It will not be affected by a change from sales commission to purchase-resale. Wholesalers of nonsponsored TBA neither know nor care whether Goodyear TBA reaches Atlantic dealers through an Atlantic distribution system under purchase-resale or through the Goodyear distribution system under sales commission.

(c) If, as the Commission's Brief charges, "wholesalers of sponsored products cannot sell to Atlantic dealers unless they are authorized supply points," that situation, too, will be cured by paragraphs 5 and 6 insofar as the Atlantic dealers' freedom of choice is concerned. Enforcement of paragraphs 1 through 4 will not affect the matter except to necessitate a change in the identities of some supply points.

(d) If it is true, as the Commission's Brief charges, that Atlantic's decision to divide its sponsorship between Goodyear and Firestone "eliminates competition between these two major firms in selling TBA to Atlantic," the situation will not be affected by a change from sales commission to purchase-resale. Again, Atlantic has the right to choose its TBA suppliers under either plan and to deal with one or more as it may deem best. The order does not seek to change this. Moreover, there is nothing in either the sales commission plan or the purchase-resale plan which forbids Goodyear and Firestone from competing with each other.

Insofar as the order affects the supposed competitive ills which the Commission recited to justify it, the results desired by the Commission are achieved by paragraphs 5 and 6. Nothing is added by paragraphs 1 through 4.

The thrust of the case, as it emerges from the three opinions below and from the Brief for the Commission, is to assure Atlantic dealers their freedom of choice and thus

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assure all TBA wholesalers an opportunity to sell to Atlantic dealers. This has already been accomplished by the portion of the Commission's order not under review. Enforcement of the remainder of the order will help no one.

On the other hand, abolition of the sales commission plan will force Atlantic to return to TBA distribution, and thus to incur needless distribution expense on the order of \$1,500,000 a year,⁶ it will handicap Atlantic in its competition with larger oil companies; it will penalize thousands of Atlantic dealers in their competition with the dealers of those larger companies; and it will impair the efficiency of TBA distribution through Atlantic dealers to the motoring public. This result is senseless. It should not be allowed to stand.

Respectfully submitted,

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6. Based on the figures compiled in 1950 and discussed on pages 13 and 14 of Atlantic's Brief.